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In The Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AKRON, PETITIONER

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.

JOHN ASHCROFT, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
Interest of the United States	1
Summary of argument	2
Argument:	
I. State regulations infringe upon a woman's right to privacy only if they unduly burden the abortion choice	4
II. In applying the "unduly burdensome" standard of review, federal courts should accord significant weight to the judgment of the state legislature	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Abrams v. *United States*, 250 U.S. 616	13
Baldwin v. *Missouri*, 281 U.S. 586	19
Ball v. *James*, 451 U.S. 355	13
Bates v. *City of Little Rock*, 361 U.S. 516	8
Beal v. *Doe*, 432 U.S. 438	7, 18
Bellotti v. *Baird*, 428 U.S. 132	5–6, 18
Bellotti v. *Baird*, 443 U.S. 622	7, 9, 18
Carey v. *Population Services International*, 431 U.S. 678	8
Colautti v. *Franklin*, 439 U.S. 379	18
Fullilove v. *Klutznick*, 448 U.S. 448	10
Gibson v. *Florida Legislative Investigation Committee*, 372 U.S. 539	8
Griswold v. *Connecticut*, 481 U.S. 479	8
H.L. v. *Matheson*, 450 U.S. 398	6, 9, 11, 18
Harris v. *McRae*, 448 U.S. 297	2, 7, 18
Kramer v. *Union Free School District*, 395 U.S. 621	17
Lochner v. *New York*, 198 U.S. 45	11
Maher v. *Roe*, 432 U.S. 464	2, 3, 7, 8, 18
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137	10–11, 16

Page

Cases—Continued:

Missouri K. & T. Ry. v. *May*, 194 U.S. 267 3

New State Ice Co. v. *Liebmann*, 285 U.S. 262 14

Pierce v. *Society of Sisters*, 268 U.S. 510 8

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 ..... 2, 5, 6, 9, 11, 18, 19

Plyler v. *Doe*, No. 80–1538 (June 15, 1982) 15

Roe v. *Wade*, 410 U.S. 113 ..... 2, 3, 4, 5, 6, 7, 13, 17

Rostker v. *Goldberg*, 453 U.S. 57 9

San Antonio School District v. *Rodriguez*, 411 U.S. 1 14

United States v. *Richardson*, 418 U.S. 166 ..... 12, 19

Valley Forge Christian College v. *Americans United for Separation of Church and State*, No. 80–327 (Jan. 12, 1982) 16

West Coast Hotel Co. v. *Parish*, 300 U.S. 379 11

Whalen v. *Roe*, 429 U.S. 589 ..... 3, 14, 16

Williamson v. *Lee Optical*, 348 U.S. 483 17

Constitution and statutes:

United States Constitution, Fourteenth Amendment (Due Process Clause) 4

Act of Nov. 20, 1979, Pub. L. No. 96–123, Section 109, 93 Stat. 926 1–2

42 U.S.C. 300a–6 1

Miscellaneous:

A. Bickel, *The Least Dangerous Branch* (1962) ... 16

H. Black, *A Constitutional Faith* (1968) 17

Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L.J. 920 (1973) 12, 19

M. Farrand, *The Records of the Federal Convention of 1787* (1911):

vol. 1 13

vol. 2 13

Page

Miscellaneous—Continued

Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L.L. Rev. 233 (1977) 7

L. Hand, *The Bill of Rights* (1958) 13

Hazard, *The Supreme Court as a Legislature*, 64 Cornell L. Rev. 1 (1978) 16

J.B. Thayer, *John Marshall* (1901) 15

Wood & Durham, *Counseling, Consulting and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U.L. Rev. 783 7

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INTEREST OF THE UNITED STATES

These cases present the question whether two legislative bodies, in the course of resolving the competing interests at stake in the abortion decision, have unduly intruded upon a woman's right of privacy. While the United States has no particularized interest in addressing the merits of the actual legislative choices made by the State of Missouri and the City of Akron, it does have a substantial interest in preserving the proper sphere of legislative action. Congress has in the past enacted legislation impacting upon the abortion decision (see 42 U.S.C. 300a–6; Act of Nov. 20, 1979, Pub. L.

No. 96–123, Section 109, 93 Stat. 926), and may again do so in the future. The United States, therefore, has a significant interest in the outcome of the cases before the Court, because they will directly impact upon the ability of this country's elected representatives—both state and federal—to deal with an important issue of continuing public debate.

SUMMARY OF ARGUMENT

The Constitution does not forbid all state regulation of the abortion decision, either during the first trimester or thereafter. "[T]he right of personal privacy includes the abortion decision, but * * * this right is not unqualified and must be considered against important state interests in regulation." *Roe* v. *Wade*, 410 U.S. 113, 154 (1973). The court of appeals in *Akron Center for Reproductive Health, Inc.* v. *City of Akron* erred in concluding that any regulation having a "legally significant impact or consequence on a first trimester abortion decision * * * is invalid" (81–746 Pet. App. 10a). As this Court has made exceedingly clear, "*Roe* did not declare an unqualified 'constitutional right to an abortion[.]' * * * Rather, the right protects the woman from *unduly burdensome interference* with her freedom to decide whether to terminate her pregnancy." *Maher* v. *Roe*, 432 U.S. 464, 473–474 (1977) (emphasis added). See also 81–746 Pet. App. 25a–36a (Kennedy, J., dissenting). Abortion regulations invalidated by this Court have been found objectionable not merely because they constitute state regulation within a protected zone of privacy, but because they constitute "unduly burdensome interference" with the abortion choice. See, *e.g.*, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 66–67, 81 (1976). Therefore, in furtherance of its important interest in protecting maternal health and potential life, a state may legitimately enact regulations relating to abortion so long as those regulations do not unduly burden the

woman's right under this Court's holding in *Roe* v. *Wade*, *supra*, to choose abortion rather than childbirth.

In applying the "unduly burdensome" standard of review to state regulation of the abortion decision, this Court should be especially sensitive to accord adequate weight to the legislative judgments involved. This Court aptly noted in *Roe* v. *Wade*, *supra*, that the "abortion controversy" has engendered "vigorous opposing views, even among physicians." 410 U.S. at 116. The abortion debate, involving questions of philosophy, medicine, religion, and oftentimes competing notions of morality, continues unabated. During the past ten years, that debate, which has resulted in numerous state enactments designed to accommodate the competing interests of those affected by the abortion decision, has centered principally in this Court. While the Court has an obligation to protect substantive constitutional rights from undue interference by the state, the Court "should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" *Maher* v. *Roe*, *supra*, 432 U.S. at 479–480 (quoting *Missouri K. & T. Ry.* v. *May*, 194 U.S. 267, 270 (1904) (Holmes, J.)).

Whether or not a particular legislative enactment unduly burdens the abortion choice depends upon the resolution of competing public policy issues upon which reasonable people readily disagree. Because the legislature has superior fact-finding capabilities, is directly responsible to the public for its resolution of the policy issues it treats, and has greater flexibility than the courts to fine-tune and redirect its efforts if a particular solution is ill-founded or unwise, the courts should test the constitutionality of legislation impacting upon the abortion choice by an appropriately deferential standard. "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Whalen* v. *Roe*, 429 U.S. 589, 597 (1977).

ARGUMENT

I. STATE REGULATIONS INFRINGE UPON A WOMAN'S RIGHT TO PRIVACY ONLY IF THEY UNDULY BURDEN THE ABORTION CHOICE

In *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, the majority of the court of appeals concluded that all state regulation of the abortion decision is subject to a "two-step analysis" (81–746 Pet. App. 9a). First, a court will inquire whether a regulatory provision has a "'legally significant impact or consequence' on the right of a pregnant woman, in consultation with a physician, to choose to terminate her pregnancy" (*ibid.*). If a regulation has no such impact, "it does not raise a constitutional issue" (*ibid.*). If, however, the regulation does have such an impact, a court must take the second step and determine "whether or not the regulatory provision serves a legitimate and compelling state interest" (*ibid.*). Even a compelling state interest, however, is insufficient to save a regulation if "it imposes an 'undue burden' on the abortion decision" (*ibid.*). In the context of first trimester abortions, this analysis is fatal to virtually all state regulation. "Since the state has no compelling interest during the first trimester of pregnancy," any regulation resulting in "a legally significant impact or consequence on a first trimester abortion decision * * * is invalid" (*id.* at 10a). In our view, the court of appeals overstated the nature of the right of privacy protected by this Court's prior abortion cases and underestimated the state's legitimate ability to accommodate the competing interests of those affected by the abortion decision.

In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), the Court concluded that the "right of privacy" emanating from the Fourteenth Amendment's Due Process Clause "is broad enough to encompass a woman's decision whether

or not to terminate her pregnancy."[1] But while the Court recognized this privacy interest, it rejected the contention that "the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses" (*ibid.*). The privacy right involved in the abortion decision, the Court concluded, "cannot be said to be absolute" (*id.* at 154).

Notwithstanding the above, some language in *Roe* v. *Wade* suggests that, at least during the first trimester, a woman's decision in consultation with her physician to terminate her pregnancy is beyond the reach of any state regulation. See 410 U.S. at 163. The Court, however, has never applied *Roe* v. *Wade* in such a sweeping manner. See, *e.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) ("Plainly, the Court today rejects any claim that the Constitution requires abortions on demand"). Indeed, in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 66–67, 80–81 (1976), the Court upheld informed consent and recordkeeping requirements that undoubtedly impacted significantly upon first trimester abortion decisions.[2] In

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[1] The cases now before the Court do not directly raise the question whether *Roe* v. *Wade*, *supra*, was correctly decided. The government, therefore, does not address that issue. The government's position in these cases, however, does not indicate agreement with *Roe* v. *Wade*.

[2] For example, the consent provision in *Danforth* required a woman to "certify in writing her consent to the procedure and *'that her consent is informed* and freely given and is not the result of coercion'" (428 U.S. at 65) (emphasis added). Despite the seemingly absolute language in *Roe* v. *Wade*, *supra*, the Court did not hold that this requirement for informed, written consent to first trimester abortions unduly intruded upon a woman's right of privacy. "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences" (428 U.S. at 67). *Danforth*, in short, noted the strength of the state interest furthered by the informed consent regulation, weighed it against its intrusion upon a woman's unfettered dis-

Bellotti v. *Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*), handed down the same day as *Danforth*, the Court explained that such state regulation of first trimester abortions "is not unconstitutional unless it unduly burdens the right to seek an abortion." Thus, the primary inquiry is not, as the court of appeals in *Akron Center* suggested, whether a particular regulation has a "significant impact" upon the abortion decision (as informed consent and recordkeeping requirements undoubtedly have), but rather whether or not a regulation "unduly burdens" the abortion choice. In making this determination, the Court must balance the state interests furthered by the regulation against the woman's privacy interest. As noted in *Roe* v. *Wade* itself, "the right of personal privacy includes the abortion decision, but * * * this right is not unqualified and must be considered against important state interests in regulation" (410 U.S. at 154).[3]

This Court has repeatedly adopted an "unduly burdensome" analysis in the context of reviewing legislative enactments impacting upon the abortion decision.

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cretion, and concluded that it did not unduly burden the abortion decision. See *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*).

[3] The Court has recognized that the state has at least two "important and legitimate" interests at stake in every abortion decision: the interest "in preserving and protecting the health of the pregnant woman," and the interest "in protecting the potentiality of human life" (410 U.S. at 162). The variables involved in the abortion decision, however, are plainly not limited to maternal health and protection of potential life. Beyond these two well-established concerns, the state has a legitimate interest in safeguarding the rights of other parties affected by the abortion decision, such as the familial prerogatives of the parents of minor girls (*H.L.* v. *Matheson*, 450 U.S. 398, 407–410 (1981); *Bellotti* v. *Baird*, 443 U.S. 622, 633–639 (1979) (*Bellotti II*) (opinion of Powell, J.)), and the "deep and proper concern" of a father for his child (*Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 69, 71–72).

Harris v. *McRae*, 448 U.S. 297, 314 (1980); *Maher* v. *Roe*, 432 U.S. 464, 473–474 (1977); *Beal* v. *Doe*, 432 U.S. 438, 446 (1977). As the Court stated in *Maher*, "the right in *Roe* v. *Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." 432 U.S. at 473–474. See also *Bellotti* v. *Baird*, 443 U.S. 622, 640 (1979) (*Bellotti* II) (opinion of Powell, J.) (the question before the Court is whether a Massachusetts statute "provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion"). Abortion regulations invalidated by the Court have never been found objectionable merely because they impact upon some unusually discrete zone of privacy, but rather because they result in an unduly burdensome interference with the abortion choice. See, *e.g.*, *Harris* v. *McRae*, *supra*, 448 U.S. at 328 (White, J., concurring) (*Roe* v. *Wade* operates to free a woman from "unreasonable official interference with private choice"). One simply cannot view "the zone of privacy as a legal island of personal autonomy in the midst of a sea of public regulation and interaction," because the metaphor fails at a most critical juncture—it does not illuminate what constitutes an impermissible "coming ashore." Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 233, 271 (1977). See also Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. Rev. 783, 803–804. The "unduly bur-

densome" standard of review provides this vital benchmark.[4]

Selection of the proper standard is vital to appropriate review of state regulations impacting upon the abortion decision. Selecting a standard of review, however, is only the beginning. It is the application of that standard that necessarily and unavoidably raises delicate issues of serious constitutional concern.

II. In Applying the "Unduly Burdensome" Standard of Review, Federal Courts Should Accord Significant Weight to the Judgment of the State Legislature

A. Abortion is an issue that has been and will continue to be the focus of great national debate. The subissues in the debate are numerous and complex, including such questions as the relative safety of medical procedures, how much information a woman should have before she makes an abortion decision, and the ex-

[4] The "unduly burdensome" standard of review, moreover, is consistent with the approach the Court has taken in other cases involving "fundamental rights." In *Carey* v. *Population Services International*, 431 U.S. 678 (1977), for example, the Court invalidated a New York statute regulating the sale and distribution of nonprescription contraceptives. The Court concluded that the statute in question, which proscribed the sale or distribution of contraceptives by other than registered pharmacists and prohibited their distribution to minors, imposed "a *significant burden* on the right of the individuals to use contraceptives" (431 U.S. at 689; emphasis added). See also *id.* at 688; *id.* at 705 (Powell, J., concurring). This language is consistent with the analysis in *Maher* and other cases discussed above. The "question of invasion of privacy is inescapably a question of degree—a question of 'unduly burdensome interference.'" Wood & Durham, *supra*, 1978 B.Y.U. L. Rev. at 805 n.104. Other "fundamental rights" cases are in accord. See, *e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965) ("maximum destructive impact"); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 545 (1963) ("infringe substantially"); *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 (1960) ("significant encroachment"); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–535 (1925) ("unreasonably interferes").

~~have before she makes an abortion decision, and the ex-~~ tent to which a spouse or the parents of a minor or immature pregnant child should be entitled to notice or consent. See, *e.g.*, *H.L.* v. *Matheson*, *supra*, 450 U.S. at 407–410; *Bellotti* v. *Baird*, *supra*, 443 U.S. at 633–639; *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 67–79.

Competing views on these and related issues are deeply held by large numbers of American citizens. Pro-life and pro-choice advocates, for example, are not likely to agree on the amount of involvement to which the parents of a minor child should be entitled with regard to that child's decision to have an abortion. Since the two sides will never agree, some governmental entity must make a choice between the two competing positions. In our democratic society the governmental body with the primary authority and responsibility to resolve competing policy views and pressures among citizens is the legislature. In the abortion context, as in many others, legislation consists of selecting one set of competing private interests over another.

In the cases currently before the Court, as well as in the case of many other abortion statutes in this country, the legislatures have done their job. Some legislatures settle upon one solution or combination of solutions, while in other states the process yields different results. But in each instance the representatives of the people—who must answer to the people for what they do—have considered the people's competing viewpoints and have made the difficult choices required by the legislative process.[5] From state to state, and from issue to issue, some have won and some have lost. Pro-choice advocates have persuaded some legislatures on parental

[5] To the extent constitutional values were implicated, those values were taken into account because legislators, like other public servants, take an oath to uphold the Constitution. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981).

notification issues but not on hospitalization; pro-life proponents have won the informed consent debate in one state and lost it in another.

These cases call for a determination of the standard that will govern abortion issues not yet resolved by the Court. For reasons stated in Part I, under this Court's precedents the "compelling state interest" test does not apply automatically to all regulations bearing on the abortion decision. Rather, that test applies only to state regulations that unduly burden the abortion decision. Whether or not a particular regulation "unduly burdens" the abortion decision, however, is far from self-evident. In light of the breadth and the ambiguity of the "unduly burdensome" standard—and in the interest of preserving the difference between what courts do and what legislatures do—this Court should clarify that in applying that standard on a case-to-case basis courts should be mindful that (1) at their root, the issues to which the "unduly burdensome" test is applied are policy issues, and different segments of our society have strong competing views concerning them; (2) the legislature has already considered the competing arguments, made the necessary factual inquiries, and reached a decision; and (3) the net effect of holding the legislative product unconstitutional is that those who succeeded in persuading the legislature of the soundness of their policy viewpoint are deprived of their legislative victory, whereas the legislative losers become the winners. These realities counsel that, in deciding which legislative policy choices are "unduly burdensome" and which are not, the Court should accord heavy deference to the legislative judgment. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980).

B. The ultimate determination of constitutionality rests, of course, with the courts, and judicial review is as basic to judicial authority as policy choices are to legislative authority. *Marbury* v. *Madison*, 5 U.S. (1

Cranch) 137 (1803). Each is equally important to separation of powers. The dividing line between constitutional interpretation and choosing among competing policy alternatives, however, is not always fine or bright. Compare *Lochner* v. *New York*, 198 U.S. 45 (1905), with *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937). The issues in this case are illustrative. On the one hand, parental entitlement to notification of or participation in an immature daughter's decision that could profoundly affect her life presents competing considerations whose resolution lie at the very core of what legislators are elected to do. See *H.L.* v. *Matheson*, *supra*, 450 U.S. at 408–410. On the other hand, courts may conclude that the legislative judgment impermissibly impedes the exercise of a constitutional right. See *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 72–75. In such cases—where the resolution of competing interests may be regarded as falling within the domain of either the legislature or the courts— which branch is entitled to deference from the other? Alternatively stated, which branch should be primary in those areas that might belong to either by application of traditional assumptions concerning the allocation of governmental authority? The legislature makes law when it chooses between competing policy alternatives. The court makes law when it declares constitutional principles. Which should enjoy residual lawmaking authority? In cases of overlap between the two, should the tilt be toward the legislature who makes law by selecting among policy choices, or toward the judge who makes law by interpreting the Constitution?[6]

[6] The issue is one that rests at the very foundation of a system of government grounded in separation of powers. It cannot be disposed of by facile generalizations such as, "legislatures cannot repeal a constitutional right" or "courts should not sit as super legislatures." The reality is that some issues fall within the purview of both legislative primacy because they involve policy choice and also judicial authority to decide constitutional-

The answer, we submit, rests on consideration of three basic differences between the legislative and judicial branches and the way those branches function. First, the legislator has superior fact-finding capability. He or she is not limited either by the case or controversy requirement, or by the decision of legal counsel in a particular case to construct the record in a particular way. The legislator is not only free to inquire into any relevant facts, but can carry that inquiry wherever the general public interest, rather than the interests of private litigants, might indicate. The second difference is that legislators must periodically account to the people for the way they have carried out their public responsibilities. By definition, issues that fall within the area of possible overlap between legislative and judicial authority involve public policy choices. They are issues that affect people. They are issues on which peoples' views may differ mightily. Vesting this residual lawmaking authority in the legislature rather than the judiciary renders the government accountable for the exercise of that authority.[7]

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ity. The issue is not one of preclusion, because neither branch should be able completely to foreclose the other in an area of overlapping authority. Rather, the issue is one of deference. Which branch should have a presumed preference in lawmaking authority in those areas that might properly belong to either? See, *e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L.J. 920, 935 n.89 (1973) ("precisely because the claims involved [in the abortion dispute] are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them—certainly not under the guise of enforcing the Constitution").

[7] As Justice Powell warned in his concurring opinion in *United States* v. *Richardson*, 418 U.S. 166, 188 (1974), vesting the courts with broad authority to second-guess legislative judgments is inherently anti-democratic:

> We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.

Third, regardless of which governmental body is vested with residual lawmaking authority, the quality of the lawmaking product is enhanced by leaving the issues exposed for a time to the legislative process and the public pressures that are brought to bear on that process.[8] See, *e.g.*, *Ball* v. *James*, 451 U.S. 355, 373 (1981) (Powell, J., concurring). One of the fundamental postulates undergirding a free and open democratic society is that the search for truth is enhanced by permitting a full and uninhibited discussion of public issues. *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Necessarily, such a discussion is more effective if the ultimate resolution of the issue has not been removed from the realm of public debate and resolution through constitutional determination. The issues in this case, as well as other abortion disputes not yet resolved by the Court, are subject to differing views that are widely and fervently held. See, *e.g.*, *Roe* v. *Wade*, *supra*, 410 U.S. at 116 (noting "vigorous opposing views, even among physicians"). The

[8] The Founding Fathers emphatically rejected the suggestion that the federal judiciary serve as a "Council of Revision" to pass upon the wisdom of "every act of the National Legislature before it shall operate * * *." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 21 (1911). Nathaniel Gorham of Massachusetts argued that he "did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." 2 M. Farrand, *supra*, at 73. It was also argued to be "necessary that the Supreme Judiciary should have the confidence of the people" and this confidence would "soon be lost, if [judges] are employed in the task of remonstrating agst. popular measures of the Legislature." *Id.* at 76–77. Elbridge Gerry of Massachusetts asserted that "[h]e relied for his part on the Representatives of the people as the guardians of their Rights and interests." *Id.* at 75. This sentiment was echoed almost a century and three-quarters later by Judge Learned Hand: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. Hand, *The Bill of Rights* 70 (1958).

best way to determine who is right and who is wrong on those issues is to permit and encourage the opposing sides to exercise their persuasive efforts on state legislators.[9] Equally beneficial to the search for the optimal solution is the likelihood that on any given issue, different legislatures will reach different results, and the ensuing practical experiences in the various states will cast further light on the underlying issues. This is the process by which a free, elected government works best.[10] To whatever extent the issues are constitu-

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[9] There are profound divisions of opinion among physicians, religious leaders, theologians, philosophers, state and federal elected representatives, and individual citizens with respect to the issue of abortion generally as well as the subissues specifically raised in the cases presently before this Court. Differences among experts are no less profound in this area than in the area of education, in which the Court has eschewed second-guessing legislative judgments. This Court's observations in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42–43 (1973), are as applicable to legislative determinations concerning abortion as to legislative decisions concerning education:

> On even the most basic questions [in the area of education] the scholars and educational experts are divided. * * * The ultimate wisdom as to these [issues] is not likely to be divined for all time even by the scholars who now so earnestly debate [them]. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

[10] In *Walen* v. *Roe*, *supra*, 429 U.S. at 597, the Court emphasized that individual states must "have broad latitude in experimenting with possible solutions to problems of vital local concern." The Court stated that "Mr. Justice Brandeis' classic statement of the proposition merits reiteration" (*id.* at n.20) (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting):

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experi-

tionalized, they are thereby removed from this refining process—the process by which lawmakers learn through experimentation and correction. Constitutionalization eliminates all but one of the competing points of view as acceptable alternatives; the issue is removed from the realm of public debate and decisionmaking.[11]

This is not to say that courts must always yield to legislatures in areas of overlap between the power of each. Rather, the point is that in those cases where the issue might be fairly characterized as involving either a choice among competing policy alternatives, or a pronouncement of constitutional principle, the presumption should favor treating the issue as one of policy choice.[12]

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ments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

[11] Moreover, to the extent the judiciary presumes to provide solutions to inherently legislative problems, it may weaken the resolve of the legislative branch to assume political accountability for those problems. James Bradley Thayer described this consequence of the exercise of judicial review in his biography of John Marshall:

> [T]he exercise of [the judiciary's power of review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors * * *. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

J.B. Thayer, *John Marshall* 106–107 (1901). See *Plyler* v. *Doe*, No. 80–1538 (June 15, 1982), slip op. 13–14 (Burger, C.J. dissenting).

[12] In addition to the differences, discussed above, between courts and legislatures, judicial deference to the legislature is

C. The fact that this Court has declared that the abortion decision is a fundamental right does not, in itself, justify far-ranging judicial preemption of state or federal legislation impacting upon that decision. The reasons are two. First, under any circumstances, assigning comparative weights to individual interests adversely affected by governmental action is a task that does not readily lend itself to judicial resolution. See A. Bickel, *The Least Dangerous Branch* 15 (1962). It is not that some interests are not more weighty or "fundamental" than others. Of course they are. But if a governmental determination of comparative importance is to be made, who is in the better position to decide what is in first place, what is in second and third place, and how much distance there is between each category?

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also supported by a consideration fundamental to separation of powers theory. Either branch could legitimately lay claim to primacy in the area of overlap, since the issues in this area involve policy choices as well as the meaning of the Constitution. The final arbiter, however, of which branch is to prevail is necessarily the judiciary. *Marbury* v. *Madison*, *supra*. Where one of the branches is not only a territorial claimant but also the final judge of the territorial dispute, that branch should conscientiously lean away from its own claim in otherwise close cases. See *Whalen* v. *Roe*, *supra*, 429 U.S. at 597. See also Hazard, *The Supreme Court as a Legislature*, 64 Cornell L. Rev. 1, 16–17 (1978). As the Court recognized in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, No. 80–327 (Jan. 12, 1982), slip op. 8–9, a restrained exercise of the ultimate judicial power of declaring a legislative act unconstitutional is essential to the continued effectiveness of that power:

> The exercise of the judicial power also affects relationships between the coequal arms of the national government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive branch. While the exercise of that "ultimate and supreme function," *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U.S. [339,] 345 [(1892)], is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role.

The "comparative fundamentality" of any interest is a function of the interests of individual persons. Those persons, moreover, are the best judges of what interests ought to be accorded greater weight by government, regardless of the theory by which the weights are assigned or the labels attached. Those persons are also the people who elect legislators. Therefore, the fine-tuning that is necessarily involved in determining which interests should be more or less weighty and what the differences should be is appropriately left to the elected branches.[13] See H. Black, *A Constitutional Faith* 11 (1968).

Second, whatever the problems generally attendant upon judicial determination of fundamental rights, the extension of that approach to these cases is particularly inappropriate. Ten years ago this Court declared a three-part set of rules prescribing what is permissible and what is impermissible, depending on the stage of pregnancy at which the abortion occurs. Many questions were left unanswered, and over the intervening decade, adversaries have periodically returned to ask

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[13] Consider, for example, the individual interests in two leading cases at opposite ends of the spectrum of this Court's deference to state legislative judgment, *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), and *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955). *Kramer* held that New York may not constitutionally limit the right to vote in school board elections to parents of school-age children or owners or renters of real property. The reason: the right to vote is fundamental. *Williamson*, by contrast, held that Oklahoma has very broad discretion to determine who may engage in the business of fitting eyeglass lenses into frames. Assume that New York adopted the same regulatory statute involved in *Williamson*, and assume further that Morris Kramer was an optician rather than a stockbroker. Which would he say was more "fundamental" to him—the right to practice his business or the right to vote for school board members so long as he had no school-age children and bore none of the schools' financial burdens?

the Court to fill in more detail, resulting in a set of rules that has become increasingly intricate and substantially more complicated. See, *e.g.*, *H.L.* v. *Matheson*, *supra*; *Harris* v. *McRae*, *supra*; *Bellotti* v. *Baird* (*Bellotti II*), *supra*; *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Maher* v. *Roe*, *supra*; *Beal* v. *Doe*, *supra*; *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*; *Bellotti* v. *Baird* (*Bellotti I*), *supra*.

In the instant cases, the competing sides in the abortion controversy are back again. Unless the Court clarifies that in applying the "undue burden" test to all future issues substantial deference is to be accorded the legislative judgment, these cases will result in more detail and more complexity, taking the Court further away from what courts do best and more into the realm of what legislatures do best.[14] Even more important,

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[14] In recent years, this Court has been called upon to engage in increasingly difficult line-drawing involving such questions as parental and spousal consent or notification (*Bellotti* v. *Baird*, *supra*, 428 U.S. at 145; *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 67–75; *Bellotti* v. *Baird*, *supra*, 443 U.S. at 639–651, 652–656; *H.L.* v. *Matheson*, *supra*, 450 U.S. at 407–413), the relative merits and demerits of such discrete medical techniques as saline amniocentesis (*Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 75–79), the determination of viability (*Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 64; *Colautti* v. *Franklin*, *supra*, 439 U.S. at 390–394), and public funding of the abortion decision (*Beal* v. *Doe*, *supra*; 432 U.S. at *Maher* v. *Roe*, *supra*; *Harris* v. *McRae*, *supra*). These and similar issues are well-suited to legislative resolution. For example, the two cases currently before the Court raise the issue whether a state may legitimately require that all second trimester abortions take place in a hospital rather than an abortion clinic. The court of appeals in No. 81–1623 rather candidly admitted that in resolving this question "it is clear that the central issue is the relative safety of nonhospitalized * * * and hospitalized [abortion techniques]" (81–1623 Pet. App. A–64). This and other remaining abortion issues (such as informed consent requirements, physician-patient counseling, and the age at which daughters may proceed without their parents being notified) are

over the ensuing decades, the adversaries will be back again and again. Each time, the set of rules will inevitably become longer and more detailed. See, *e.g.*, *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*, 428 U.S. at 92 (White, J., dissenting) ("[t]he task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process"). Very simply, that is an unfair and improper burden to impose upon any Constitution. It is especially unfair to impose it on a Constitution that contains no mention of the words "privacy" or "abortion" and that can be extended to those matters only by piecing together a combination of shadows from a variety of explicit guarantees contained in the document.[15] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, *supra*, 82 Yale L.J. at 937–949.

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the kinds of issues best resolved by legislatures, with their superior fact-finding capabilities and their ability to redirect and fine-tune their efforts in light of evolving medical knowledge and other changed circumstances. As Justice Powell noted in his concurring opinion in *United States* v. *Richardson*, 418 U.S. 166, 188 (1974):

> repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negate the actions of the other branches.

[15] *Baldwin* v. *Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting):

> [W]e ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.

The time has come to call a halt to that process. The Court should declare that the governing standard is whether the state regulation at issue unduly burdens the abortion decision, and that in deciding on a case to case basis whether the burden is permissible or impermissible, courts should give heavy deference to the state legislative judgment. In the cases before the Court, the effect of that holding will be to vacate the judgments of the court of appeals to the extent they fail to uphold the constitutionality of what the Missouri legislature and the Akron City Council have done, and to remand the cases for further consideration under a more deferential standard. In the future, the effect will be to channel further refinements of abortion law largely into the stream of state legislative authority.

CONCLUSION

The portions of the court of appeals' judgments that invalidate segments of petitioners' abortion regulations should be vacated and the cases remanded for reconsideration in light of the standard proposed in this brief.

Respectfully submitted.

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